

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of March, two thousand eight.

PRESENT:

HON. SONIA SOTOMAYOR,
HON. ROBERT A. KATZMANN,
HON. BARRINGTON D. PARKER,
Circuit Judges.

HARDEV SINGH,
_____*Petitioner,*

v.

07-1797-ag (L);
07-2738-ag (con)
NAC

MICHAEL B. MUKASEY¹, ATTORNEY GENERAL,
Respondent.

FOR PETITIONER: Hardev Singh, Pro Se, Jackson
Heights, New York.

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as the respondent in this case.

FOR RESPONDENT: Peter D. Keisler, Assistant Attorney General, Civil Division, James E. Grimes, Senior Litigation Counsel, Gregory M. Kelch, Attorney, United States Department of Justice, Washington, District of Columbia.

UPON DUE CONSIDERATION of these petitions for review of two decisions of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petitions for review are GRANTED in part and DENIED in part.

Petitioner Hardev Singh, a native and citizen of India, seeks review of the April 5, 2007 order of the BIA affirming the September 13, 2005 decision of Immigration Judge ("IJ") Alan Vomacka denying petitioner's application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Hardev Singh*, No. A76 846 720 (B.I.A. Apr. 5, 2007), *aff'g* No. A76 846 720 (Immig. Ct. N.Y. City Sept. 13, 2005). The petitioner also seeks review of the June 1, 2007 order of the BIA denying his motion to reconsider. *In re Hardev Singh*, No. A76 846 720 (B.I.A. Jun. 1, 2007). We assume the parties' familiarity with the underlying facts and procedural history of the case.

A. Asylum, Withholding of Removal, and CAT Relief

When the BIA agrees with the IJ's adverse credibility determination and emphasizes particular aspects of that

decision without rejecting any of the IJ's findings, we "will review both the BIA's and the IJ's opinions - or more precisely, we review the IJ's decision including the portions not explicitly discussed by the BIA." *Yun-Zui Guan v. Gonzales*, 432 F.3d 391, 394 (2d Cir. 2005). We review the agency's factual findings under the substantial evidence standard, and treat them as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); see *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 & n.7 (2d Cir. 2004), *overruled in part on other grounds by Shi Liang Lin v. U.S. Dept. of Justice*, 494 F.3d 296, 305 (2d Cir. 2007) (en banc). However, we will vacate and remand for new findings if the agency's reasoning or its fact-finding process was sufficiently flawed. *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 406 (2d Cir. 2005); *Tian-Yong Chen v. INS*, 359 F.3d 121, 129 (2d Cir. 2004). This Court reviews de novo questions of law, including what quantum of evidence will suffice to discharge an applicant's burden of proof. See, e.g., *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003).

We find that the IJ's adverse credibility determination was not supported by substantial evidence. In his decision, the IJ relied in large part on his finding that Singh

presented "no information, no background information, no documents, etc., to portray himself as a person deeply involved with Sikh issues or the Sikh religion." This was despite the fact that Singh presented affidavits from different individuals that were corroborative of his claim, as well as a membership card that supported his claimed involvement with the Akali Dal Mann. However, the IJ dismissed this evidence using flawed reasoning that was not supported by the record. Specifically, the IJ found that three of the typewritten affidavits submitted in support of Singh's application for relief looked "quite suspicious" given that they had "noticeable obvious similarities between the typewriter used" despite coming from different offices and different sources.

An IJ is "fully entitled to make findings concerning the authenticity of submitted evidence, based on her own examination and her professional analysis." *Souleymane Niang v. Mukasey*, 511 F.3d 138, 146 (2d Cir. 2007). Such findings ordinarily merit deference. *Id.* However, we have "refused to credit the IJ's finding that submitted documents were false when we have determined that the IJ based his conclusion on unjustified assumptions and engaged in unsupported speculation." *Id.* A finding that particular

documents are not authentic may not be based on flawed reasoning, speculation, or conjecture. See *Siewe v. Gonzales*, 480 F.3d 160, 168-69 (2d Cir. 2007). The point at which a finding "ceases to be sustainable as reasonable and, instead, is justifiably labeled 'speculation' . . . cannot be located with precision." *Ming Xia Chen v. BIA*, 435 F.3d 141, 145 (2d Cir. 2006). However, while "bald" speculation is an impermissible basis for an adverse credibility finding, "[t]he speculation that inheres in inference is not 'bald' if the inference is made available to the factfinder by record facts, or even a single fact, viewed in the light of common sense and ordinary experience." *Siewe*, 480 F.3d at 168-69. Accordingly, so long as an IJ's finding is "tethered to record evidence, and there is nothing else in the record from which a firm conviction of error could properly be derived," the Court will not disturb the agency's finding that the applicant's testimony was inherently implausible. See *Wensheng Yan v. Mukasey*, 509 F.3d 63, 67 (2d Cir. 2007); see also *Siewe*, 480 F.3d at 169.² Even under this generous standard, we cannot find

²Here, the IJ appeared to find both that the affidavits Singh submitted were fraudulent and that his assertions regarding these affidavits were inherently implausible. We note that Singh never denied that the affidavits were

support for the IJ's findings in this case.

The IJ asserted that there was only a "one in a thousand chance" that Singh's affiants would use the same public typewriter. This was despite Singh's testimony that, to his knowledge, this was a common practice in that region of India. The IJ did not point to any evidence in the record or background materials that would rebut Singh's testimony and support the IJ's own theory about the prevalence and use of English language typewriters in India. See *Cao He Lin*, 428 F.3d at 405 ("absent record evidence of practices in foreign countries, the IJ must not speculate as to the existence or nature of such practices"). Instead, the IJ erroneously relied on his own speculation and assumptions. See *id* at 405-06. Therefore, the IJ erred in deeming these documents to be inauthentic. See *Souleymane Niang*, 511 F.3d at 146.

The IJ also found that Singh was "close to speechless" when he was asked about the elections that he assisted with in India. Where an applicant gives "sparse" testimony, the fact-finder may "fairly wonder whether the testimony is

prepared on the same typewriter or notarized by the same notary.

fabricated," and "may wish to probe for incidental details, seeking to draw out inconsistencies that would support a finding of lack of credibility." *Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 152 (2d Cir. 2003), *overruled in part on other grounds by Shi Liang Lin*, 494 F.3d at 305. Here however, it is unclear how Singh's testimony was "sparse" where he testified to the different tasks that he was assigned during the elections, when the elections occurred, which election was opposed by the Akali Dal Mann organization, and which election was boycotted. Moreover, the IJ did not probe for additional details regarding the elections or draw out inconsistencies in Singh's testimony on that topic. See *id.* As such, Singh's alleged "speechlessness" was not supported by the record and as noted, was not a proper basis for the IJ's adverse credibility finding.

In addition, the IJ found that the inconsistencies and vagueness identified by an immigration officer in the report prepared after Singh's asylum interview deserved "some weight" in his adverse credibility determination. However, the IJ did not clarify which details within the report he relied upon, or how they related to his own adverse credibility findings. This lack of any meaningful analysis

fails to provide substantial evidence in support of the IJ's credibility determination.³ See *Poradisova v. Gonzales*, 420 F.3d 70, 77 (2d Cir.2005).

It is evident that the IJ placed a significant amount of weight on these erroneous findings given that the remainder of his adverse credibility determination hinged on minor discrepancies in the documentary evidence that Singh submitted. Even assuming that such findings were not improper, we remand the case to the agency because it cannot be stated with confidence that the IJ would adhere to the same decision, absent the errors we have identified. See *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 339-40 (2d Cir. 2006); see also *Li Hua Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 111 (2d Cir. 2006) ("The more central an errant finding was to the IJ's adverse credibility determination, naturally, the less confident we can be that

³We have held that inconsistencies between an applicant's testimony and the report of an asylum interview may form the basis of a proper adverse credibility determination, as long as the report contains a "meaningful, clear, and reliable summary of the statements made by [the applicant] at the interview." See *Maladho Djehe Diallo v. Gonzales*, 445 F.3d 624, 631-33 (2d Cir. 2006). We have never held, however, that an IJ may rely on an immigration officer's assessment of the applicant's credibility to support his own credibility determination.

remand would be futile"); *Bao Zhu Zhu v. Gonzales*, 460 F.3d 426, 433 (2d Cir. 2006) (finding that remand was required where the IJ's flawed finding constituted the "bulk of the IJ's reasoning" and that, even if proper, the additional inconsistencies regarding "small details" could not "on their own support the adverse credibility finding").

B. Adjustment of Status

We find, however, that the BIA did not err in determining that Singh was ineligible to adjust his status. Because Singh was determined not to be eligible for relief due to the revocation of his wife's approved visa petition, he did not have any right to delay the proceedings in an attempt to pursue some "speculative possibility" that he may become eligible for relief through an appeal process with the Department of Homeland Security. *See Morgan v. Gonzales*, 445 F.3d 549, 552 (2d Cir. 2006).

In his motion to reconsider, Singh argued that the BIA erred in refusing to adjudicate his challenge to the revocation of his approved visa petition. The BIA denied that motion, concluding that neither it nor the IJ had jurisdiction to approve or revoke a visa petition. We review the BIA's denial of a motion to reconsider for abuse

of discretion. See *Jin Ming Liu v. Gonzales*, 439 F.3d 109, 111 (2d Cir. 2006). We find that the BIA did not abuse its discretion in concluding that Singh failed to demonstrate eligibility for relief based on his revoked visa petition. Given that Singh failed to provide any evidence that the petition had been approved, he did not demonstrate his eligibility to adjust his status. See 8 C.F.R. § 205.2. To the extent Singh contends that the BIA erred by ignoring the fact that Singh's wife had apparently appealed the revocation of her approved petition, it was not error for the BIA to decline to halt the proceedings pending the outcome of that appeal. See *Morgan*, 445 F.3d at 552.

Because Singh has not challenged the BIA's finding that he was ineligible for cancellation of removal, we deem that claim abandoned. See *Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n.1, 545 n.7 (2d Cir. 2005).

Accordingly, we deny the petition for review as to Singh's challenge to the BIA's refusal to revisit the revocation of the approval of his wife's visa petition. Such denial is dispositive of the petition for review in Docket No. 07-2738-ag (Con). However, we grant the petition for review in Docket No. 07-1797-ag (L) insofar as we find

that the denial of Singh's application for asylum, withholding of removal, and CAT relief was not supported by substantial evidence.

For the foregoing reasons, the petition for review in Docket No. 07-2738-ag (Con) is DENIED. The petition for review in Docket No. 07-1797-ag (L) is GRANTED in part and DENIED in part, the BIA's decision is VACATED in part, and the case REMANDED for further proceedings consistent with this order. As we have completed our review, the pending motion for a stay of removal in this petition is DISMISSED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____